STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its DELTA COLLEGE CHAPTER 359, Charging Party, v. SAN JOAQUIN DELTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. S-CE-360 Request for Reconsideration PERB Decision No. 261 HERB Decision No. 261b March 16, 1983

Appearances: Peter A. Janiak, Attorney for the California School Employees Association and its Delta College Chapter 359; and J. Michael Phelps, Attorney for the San Joaquin Delta Community College District.

Before Gluck, Chairperson, Jaeger and Burt, Members.

DECISION

BURT, Member: The Public Employment Relations Board (PERB or Board), having duly considered the request for reconsideration filed by the San Joaquin Delta Community College District (District), hereby denies that request.

DISCUSSION

In San Joaquin Community College District (11/30/82) PERB Decision No. 261, the Board held that the District discriminatorily transferred Burton Gray from the campus police

force to the grounds crew, thus violating subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).[1] PERB Decision No. 261 is incorporated by reference herein.

To demonstrate that reconsideration is warranted under PERB rule 32410,[2] the District must show the existence of "extraordinary circumstances." Livermore Valley Joint Unified School District (10/21/81) PERB Order No. JR-9. The District

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[1]EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code unless otherwise noted. Subsections 3543.5(a) and (b) provide as follows:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

2pERB rules and regulations are codified at California Administrative Code, title 8, section 31001 et seq. Section 32410 provides as follows:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision 20 days following the date of service of the decision. An original and 5 copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of

contends that extraordinary circumstances exist in this case because the Board committed prejudicial errors of fact, and further argues that newly discovered evidence should be considered by the Board.

The District first argues that the Board erred in its factual finding that the District was aware of Burton Gray's participation in his wife Shirley Gray's affirmative action appeal. It argues that, while other District officials may have had such knowledge, the two District officials who made the decisions regarding Gray's discipline, Bandley and DeRicco, were unaware of such participation. In this regard, we note

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> the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.
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> (b) Any party shall have 20 days from service to file a response to the request for reconsideration. An original and 5 copies of the response shall be filed with the Board itself in the headquarters office. Service and proof of service of the response pursuant to Section 32140 are required.
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> (c) The filing of a request for reconsideration shall not operate to stay the effectiveness of a decision of the Board itself unless otherwise ordered by the Board itself.

that the May 9, 1980 petition from other officers, which prompted the disciplinary action against Burton Gray, made a direct reference to that affirmative action grievance.

Gray was summoned to a meeting by District officials on May 14, 1980 and confronted by, among others, Bandley and DeRicco, who questioned him about the allegations in the letter and petition. We thus reject the allegation that Bandley and DeRicco lacked knowledge of Gray's role in the affirmative action grievance filed by Shirley Gray. The record amply demonstrates that the administration of the District in general, and Bandley and DeRicco in particular, were aware of Burton Gray's participation therein.

The next error of law alleged by the District is the Board's conclusion that DeRicco expressed animus against Gray for his activities on behalf of California School Employees Association (CSEA). The District's arguments in this regard are nothing more than a restatement of its arguments at trial and in post-hearing briefs and exceptions. Nothing in the District's current presentation of these arguments convinces the Board that it erred in concluding that DeRicco's remarks were an expression of anti-union animus.

Next, the District alleges that the Board's finding that Gray's discipline was connected to his monitoring of the CSO program and criticism thereof was an error of fact. That finding was based upon our consideration of circumstantial evidence. The District presents no new material regarding this

issue, but merely attempts to reargue matters raised in its exceptions and fully considered by the Board. Nothing in the District's reargument causes us to reconsider our earlier finding.

The next claim by the District in support of its request is that tape recordings and other material elicited in the discovery phase of a civil rights suit filed by the Grays constitute newly discovered evidence. The tape recordings, made by CSEA, are of testimony taken at the July 24, 1980 District disciplinary hearing. Among the bases for PERB's underlying decision was that the evidence of Gray's wrongdoing presented at that hearing was extremely weak. The District was provided with a full and fair opportunity to present PERB with evidence as to what transpired at that hearing. At the PERB hearing in November and December of 1980, the District did introduce testimony of the witnesses who testified before the District at the disciplinary hearing. Those witnesses had a full opportunity to relate their recollection as to what their testimony was at that disciplinary hearing. The District then had a full and fair opportunity to brief that issue, along with the other issues in the case, to the administrative law judge (ALJ) in its trial brief, submitted April 6, 1981. The ALJ's decision issued May 8, 1981. The District filed exceptions to the Board on May 28, 1981. PERB's Decision and Order issued on November 30, 1982.

According to the District, "the reasonableness of its discipline of Burton Gray must be judged from the testimony given, and the evidence reintroduced at the July 24, 1980 disciplinary hearing, rather than the testimony given at the PERB hearing." According to the District, the tapes show that the testimony of certain witnesses at the disciplinary hearing contradicted their recollection of that testimony, which was given under oath at the subsequent PERB hearing. Thus, according to the District, the evidence in tape-recorded form is more damaging to Burton Gray than testimony of those same witnesses before the PERB hearing. The District in essence seeks to impeach the testimony given by its own witnesses at the PERB hearing through introduction of allegedly newly discovered evidence on reconsideration.

According to the District, the tape recordings in question were obtained from CSEA pursuant to the discovery process in the civil rights suit ". . . in or about early July, 1981." PERB first received notice of the existence of such material on December 20, 1982, when the instant request for reconsideration was filed, approximately 18 months after the tapes came into the District's possession.

We decline to consider this allegedly newly discovered evidence, for the reasons which follow.

Under the test for discrimination set forth in Novato Unified School District (4/30/82) PERB Decision No. 210, once the charging party raised the inference that the transfer of Gray was improperly motivated, the burden shifted to the District to demonstrate that it would have so disciplined Gray regardless of his protected activity. The District thus had the burden of producing evidence regarding its basis for discipline.

It did introduce such evidence, including the recollection of its own witnesses as to their testimony at the PERB hearing. PERB considered that evidence and reached its conclusion. In urging PERB to consider the "newly discovered" evidence herein, the District does not argue that PERB reached an unjustifiable result based upon the evidence before it. Rather, the District seeks to have PERB consider its "new" evidence and reach a contrary conclusion.

In deciding whether to consider the taped evidence, we have been guided by applicable statutes and precedent governing such claims in civil cases.

As noted supra, PERB's rule 32410 provides, in pertinent part, as follows:

> . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence. . . .

That language parallels the standard utilized by civil courts in determining whether to grant a new hearing on the basis of newly discovered evidence. The California Code of Civil Procedure provides, at section 657.4:

> The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party;
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> . . . . . .
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> 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence have discovered and produced at the trial.
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> . . . . . .

In discussing the above-cited statutory language, the leading authority on California law indicates that "because of the possibility that the moving party may have been guilty of neglect, this ground is looked upon with 'distrust and disfavor', and a strong showing of the essential requirements must be made." Witkin, California Procedure (1971) vol. 5, at p. 3606. A recent appellate court decision restated this general rule, holding that the party asserting newly discovered evidence as a ground for a motion for a new trial must establish that the evidence (1) is newly discovered; (2) that reasonable diligence has been exercised in its discovery and production; and (3) that it is material in the sense that it is

likely to produce a different result. Horowitz v. Noble (1978) 79 Cal.App.3d 120 [144 Cal.Rptr. 710]. The District's submission clearly fails to satisfy the first two requirements.

As to the requirement that the evidence be newly discovered, we note that the evidence which the District seeks to introduce is not new, and is newly discovered only in the limited sense that its existence in tape-recorded form had not been discovered by the District at the time of the PERB hearing. However, the declarants of the evidence in question were present and available to testify, and did in fact testify, at the PERB hearing. Presumably, they were aware of the content of their own testimony at the District disciplinary hearing. Thus, the evidence itself is not newly discovered by the District at all.

The second requirement, that of diligence in presentation of newly discovered evidence, is strongly emphasized in the cases. Lack thereof is a frequent reason for denial of new trial motions and/or reversals of orders for new trials. Witkin, supra, p. 3609. As one court of appeals noted recently, ". . . it is evident that the parties seeking reconsideration must provide not only new evidence, but also a satisfactory explanation for the failure to produce that evidence at an earlier time." Blue Mountain Development Company v. Chester Carvill (1982) 132 Cal.App.3d 1005, at 1013.

Here, the District had the allegedly newly discovered evidence in its possession for 18 months before presenting it to the trier of fact. The evidence could have been submitted to PERB at or near the time the District received it, in July of 1981, slightly more than a month after the District filed its exceptions and well in advance of issuance of PERB's decision. The Board might have been amenable to reopening the record and considering such evidence at that time. The District provides absolutely no explanation for waiting 18 months before disclosing such evidence. For this reason, we decline to consider the alleged newly-discovered evidence submitted by the District.

Having thus rejected each of the District's arguments in support of its request for reconsideration, for the reasons set forth above, we find that the District has failed to demonstrate the existence of extraordinary circumstances warranting reconsideration.

ORDER

The request by San Joaquin Delta Community College District that the Public Employment Relations Board grant reconsideration of San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261, is DENIED.

Chairperson Gluck and Member Jaeger joined in this Decision.